CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 304 110.

THE CINCINNATI STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

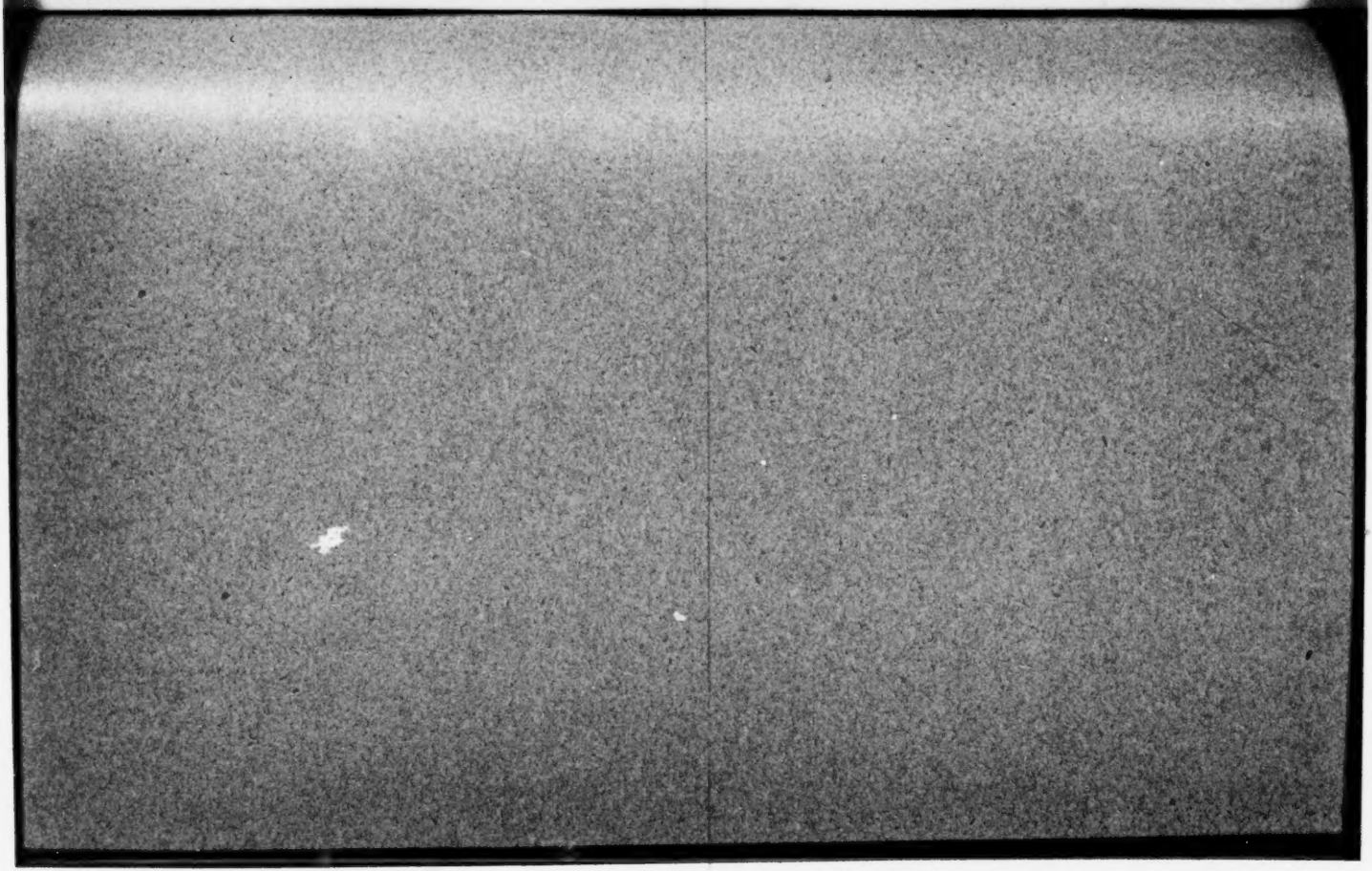
vs.

CHARLES B. SNELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JULY 28, 1899.

(17,478.)



(17,478.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 364.

THE CINCINNATI STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES B. SNELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 10, 1900.

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1 & 2 In the Supreme Court of Ohio.

CHARLES B. SNELL, Plaintiff in Error,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant in Error. } No. 6269.

Error to circuit court of Hamilton county, O.

Record.

John W. Wolfe, Thos. L. Michie, attorneys for plaintiff in error.
Paxton, Warrington & Boutet, attorneys for defendant in error.

Filed Oct. 4, 1898, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

3 In the Supreme Court of Ohio.

CHARLES B. SNELL, Plaintiff in Error,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant in Error. } (No. 6269.)

Petition in Error.

(Filed September 21, 1898)

Charles B. Snell, the plaintiff in error, complains of The Cincinnati Street Railway Company, a corporation, defendant in error, for that at the June term, 1898, the said defendant in error recovered a judgment against the plaintiff in error in a certain cause pending in the circuit court of Hamilton county, Ohio, wherein Charles B. Snell was plaintiff in error and The Cincinnati Street Railway Company was defendant in error, wherein said court affirmed the judgment of the common pleas court of Hamilton county, Ohio, in a certain action therein pending, wherein the said Charles B. Snell was plaintiff and The Cincinnati Street Railway Company was defendant.

Plaintiff in error files herewith a transcript of the docket and journal entries in said cause and the original papers and the record in said cause.

4 Plaintiff in error avers that there is error in said record in this, to wit:

1. The circuit court of Hamilton county, Ohio, committed error in affirming the judgment of the court of common pleas in said cause.

2. The circuit court of Hamilton county, Ohio, erred in rendering judgment in favor of the defendant in error and against the plaintiff in error.

3. The circuit court of Hamilton county, Ohio, erred in affirming judgment of the court of common pleas of Hamilton county, Ohio, which overruled and denied the motion of the plaintiff in error to change the venue in the said action to the adjoining county from the said Hamilton county, most convenient to the parties to said action, pursuant to the provisions of section 5033 of the Revised Statutes of Ohio.

Wherefore plaintiff in error prays that said judgment of the circuit court may be reversed and that it may be restored to all rights which it has lost by reason thereof.

JOHN W. WOLFE,
THOS. L. MICHIE,
Attorneys for Plaintiff in Error.

Precipe.

Hon. J. B. Allen, clerk supreme court, Columbus, O.:

The attorneys for defendant in error refused to accept service. Let summons in error issue, directed to the sheriff of Hamilton county, Ohio.

Yours truly,

JOHN W. WOLFE AND
THOS. L. MICHIE,
Attorneys for Plaintiff in Error.

5 *Summons in Error.*

(Filed September 24, 1898.)

THE STATE OF OHIO, }
City of Columbus. }

To the sheriff of the county of Hamilton:

You are hereby commanded to notify The Cincinnati Street Railway Company, defendant in error, that Charles B. Snell, plaintiff in error, has filed a petition in the clerk's office of the supreme court of the State of Ohio, asking a reversal of a judgment which defendant in error obtained against plaintiff in error at the June term, A. D. 1898, of the circuit court of Hamilton county, and that unless the said defendant in error attend forthwith before said supreme court, said judgment may be reversed.

You will make due return of this summons October 3, A. D. 1898.

[SEAL.] Witness my hand and the seal of said supreme court this twenty-first day of September, A. D. 1898.

JOSIAH B. ALLEN,
Clerk of Supreme Court of Ohio,
By CHAS. C. PICKERING, *Deputy.*

Sheriff's Return.

1898, September 22.—Served the within-named The Cincinnati Street Railway Company, defendant in error, by delivering a true copy of this writ, with all the endorsements thereon, personally to James A. Collins, secretary thereof, no other chief officer being found.

CHRIS REICHEL,
Sheriff of Hamilton County, O.,
By ROB'T SWEENY, *Deputy.*

6 In the Circuit Court of Hamilton County, Ohio.

CHARLES B. SNELL, Plaintiff in Error,
against
THE CINCINNATI STREET RAILWAY COMPANY, Defendant in Error.

Transcript of Docket and Journal Entries.

To July 5, 1897.—Petition in error, transcript and original papers and bill of exceptions filed June 23, 1897. Common pleas No. 94336.

1897, June 23.—Summons in error issued.

1897, July 3.—Summons in error returned 1897, June 23. Served the within-named The Cincinnati Street Railway Company, defendant in error, by delivering a true copy of this writ, with all the endorsements therein, personally to James R. Collins, secretary thereof, no other chief officer being found. Chris Reichel, sheriff of Hamilton Co., O., by Rob't Sweeny, deputy sheriff. Fees, $1.

1898, June 16.—Min. 195. Answer of Cincinnati Street Railway Co. filed by leave.

Now come The Cincinnati Street Railway Company, defendant in error herein, and for answer to the petition of plaintiff in error, says,

7 that since the date of the entry made in this cause on December 26, 1896, overruling plaintiff's motion for a change of venue, and to reverse which the present proceedings in error are prosecuted, the plaintiff requested the cause to be set for trial and to be tried before Hon. Howard Hollister, judge, and a jury, in the common pleas court of Hamilton county, Ohio; that the cause was tried before such court and jury, without objection on plaintiff's part, and a verdict therein was rendered against the plaintiff and in favor of the defendant Street Railway Co.; that judgment was entered upon the verdict on May 22, 1897, in favor of defendant, The Street Railway Co.; that said judgment is unreversed; and that no proceedings in error have been commenced or prosecuted by plaintiff to reverse or vacate said judgment.

Wherefore defendant in error prays that, since the order overruling the motion for change of venue was interlocutory and not final, and since no other proceedings in error have been commenced

herein, the present petition in error may be dismissed, and that it may go hence without day and recover its costs herein.

PAXTON, WARRINGTON AND BOUTET,
Attorneys for Defendant in Error.

STATE OF OHIO, } ss:
Hamilton County, }

John Kilgour, being duly sworn, says he is president and general manager of the Cincinnati Street Railway Co., and that the facts stated in the foregoing answer are true, as he believes.

JOHN KILGOUR.

Subscribed and sworn to before me this sixteenth day of June, 1898.

J. D. MEEKER,
Notary Public, Ham. Co., O.

8 1898, July 11.—Min., 283.

Amendment Filed by Leave.

Now comes The Cincinnati Street Railway Company, defendant in error, and by leave of court first had and obtained and by way of amendment to its answer herein, without withdrawing any of the averments thereof, says:

That it is advised and so alleges, that section five thousand and thirty-three (5033) of the Revised Statutes of Ohio is in conflict with the constitution of Ohio, and more particularly with section one, two and sixteen, article one thereof, or the bill of rights; that said section of said Revised Statutes is also in conflict with the Constitution of the United States, and more particularly with section one of article fourteen thereof; and that said Revised Statutes is null and void for these reasons.

Wherefore defendant in error prays as in its original answer, and also that said section of said Revised Statutes be declared and held to be null and void.

PAXTON, WARRINGTON & BOUTET,
KITTREDGE & WILBY,
Attorneys for Defendant in Error.

1898, July 18.—Min., 300.

Entry of Affirmance.

This cause came on for hearing upon the petition in error, the transcript and original papers and pleadings from the court of common pleas of Hamilton county, and was argued by counsel; on consideration whereof the court find there is no error apparent upon the record and proceedings in said court.

9 It is therefore considered by this court that the judgment rendered by the court below be and the same is hereby af-

ffirmed; that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—, and that a special mandate be sent to the common pleas court for execution upon this judgment.

To all of which the plaintiff in error excepts.

1898, July 25.—Min. 367. Reply of Charles B. Snell filed by leave.

(Duly certified.)

10 Court of Common Pleas, Hamilton County, Ohio.

CHARLES B. SNELL, Plaintiff,
against
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Ohio, Defendant.

Additional Transcript of Docket Entries.

1895, March 30.—Min. 1222. Mandate from circuit court. Judgment reversed. Cause remanded.

1896, March 4.—Mandate from supreme court filed.

March 6.—Min. 1074. Mandate from supreme court. Judgment of circuit court affirmed.

April 7.—Min. 1703. Jury impaneled and sworn. Cause progressed first day.

April 8.—Min. 1704. Cause progressed second day.

April 9.—Min. 1705. Cause progressed third day.

April 10.—Min. 1708. Cause progressed fourth day.

April 13.—Min. 1709. Cause progressed, jury disagreed, case continued.

October 1.—Affidavit for change of venue filed.

October 1.—Motion for change of venue filed.

October 13.—Min. 1709. Entry overruling change of venue. Plaintiff excepts.

Nov. 27.—Motion for change of venue filed.

Nov. 27.—Affidavit for change of venue filed.

11 Dec. 26.—Min. 1796. Entry overruling motion for change of venue. Plaintiff excepts.

1897, Jan. 28.—Min. 2026. Entry allowing bill of exceptions.

Jan. 28.—Min. 2026. Bill of exceptions filed by leave.

April 15.—Min. 1709. Jury impaneled and sworn, cause progressed first day.

April 16.—Min. 1710. Cause progressed second day.

April 19.—Min. 1712. Cause progressed third day.

April 20.—Min. 1713. Cause progressed and verdict for defendant.

April 22.—Motion for new trial filed.

May 22.—Min. 1731. Entry overruling motion for new trial and judgment on verdict for debt, with costs. Defendant excepts.

(Duly certified.)

Bill of Exceptions.

(Filed June 23, 1897.)

Be it remembered that heretofore to wit, on the twenty-seventh day of November, 1896, the plaintiff, Charles B. Snell, filed his motion in the above-entitled cause for change of venue in the above-entitled action, to the adjoining county to the said Hamilton county, most convenient for both parties to the said action, pursuant to the provisions of section 5033, of the Revised Statutes of Ohio, and that on said date, the plaintiff in the above-entitled action, Charles B. Snell, in support of the said motion, filed his own affidavit
12 and the several affidavits of William Schmidt, Jr., Lewis Stentz, Orlestus C. Trisler, John W. Wolfe and Thos. L. Michie, which affidavits were in the words and figures following:

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff,
vs.
THE CINCINNATI STREET RAILWAY, Defendant. } Affidavit.

"STATE OF OHIO,
Hamilton County, } *ss:*

"Charles B. Snell, being duly sworn, says that he is the plaintiff in the above-entitled action, now pending in the court of common pleas, of the said Hamilton county; that the defendant in the above-entitled action is a corporation, and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the defendant keeps its principal office, and in which said county the said action is now pending, and that this affiant cannot, as he believes, have a fair and impartial trial in the said county.

"(Signed) CHARLES B. SNELL.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, A. D. 1896.

"[SEAL.] JOEL C. CLORE,
"*Notary Public in and for Hamilton County, Ohio.*"

40 cents due notary.

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant. } Affidavit.

13 "STATE OF OHIO,
Hamilton County, } *ss:*

"William Schmidt, Jr., a credible person, being duly sworn, says that he resides in the said Hamilton county, Ohio; that he is now,

and for three years last past, has been engaged in the practice of law in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action, now pending in the court of common pleas, of the said Hamilton county; that The Cincinnati Street Railway Co., the defendant in the above-entitled action, is a corporation, and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county said defendant keeps its principal office, and in which said county the said action is now pending; and that this affiant believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county.

"(Signed) WM. SCHMIDT, JR.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, 1896.

"[SEAL.] JOHN C. ROGERS,

"*Notary Public in and for Hamilton County, O.*"

40 cents due notary.

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff, *vs.* THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant.	Affidavit.

"STATE OF OHIO, *Hamilton County,* } *ss:*

"Lewis Stentz, a credible person, being duly sworn, says
14 that he resides in the said Hamilton county, Ohio; that he is now and for one year last past, has been engaged in the business of life insurance, as managing agent of the Northwestern Life Assurance Company, and has resided for the past five (5) years in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action, now pending in the court of common pleas of the said Hamilton county; that The Cincinnati Street Railway Company, the defendant in the above-entitled action, is a corporation and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the said defendant keeps its principal office, and in which said county the said action is now pending, and that this affiant believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county.

"(Signed) LEWIS STENTZ.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, A. D. 1896.

"[SEAL.] JOEL C. CLORE,

"*Notary Public in and for Hamilton County, Ohio.*"

40 cents due notary.

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant. } Affidavit.

"STATE OF OHIO, *Hamilton County,* } *ss:*

"Orlestus C. Trisler, a credible person, being duly sworn, says that he resides in the said Hamilton county, Ohio; that he is now and for three (3) years last past, has been engaged in the practice of law in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action, now pending in the court of common pleas, in the said Hamilton county; that The Cincinnati Street Railway Co., the defendant in the above-entitled action, is a corporation and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the said defendant keeps its principal office, and in which said county the said action is now pending; and that this affiant believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county.

"(Signed) ORLESTUS C. TRISLER.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, 1896.

"[SEAL.] JOHN C. ROGERS,
"*Notary Public in and for Hamilton County, Ohio.*"

40 cents due notary.

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant. } Affidavit.

"STATE OF OHIO, *Hamilton County,* } *ss:*

"John W. Wolfe, a credible person, being duly sworn, says that he resides in the said Hamilton county, Ohio; that he is now and for twelve years last past, has been engaged in the practice of law in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action, now pending in the court of common pleas, in the said Hamilton county; that The Cincinnati Street Railway Company, the defendant in the above-entitled action, is a corporation and has more than fifty stockholders in the said Hamilton county, Ohio, in which said county the said defendant keeps its principal office, and in which said county the said action is now pending, and that this affiant

believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county.

"(Signed) JOHN W. WOLFE.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, 1896.

"[SEAL.] JOHN C. ROGERS,

"*Notary Public in and for Hamilton County, O.*"

40 cents due notary.

"Court of Common Pleas, Hamilton County, Ohio.

"CHARLES B. SNELL, Plaintiff,
vs.
THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant. } Affidavit.

"STATE OF OHIO, *Hamilton County,* } *ss:*

"Thos. L. Michie, a credible person, being duly sworn, says that he resides in the said Hamilton county, Ohio; that he is now and for four years last past, has been engaged in the practice of law in the city of Cincinnati, in the said county; that Charles B. Snell is the plaintiff in the above-entitled action now pending in the
17 court of common pleas of said Hamilton county; that The Cincinnati Street Railway Company, the defendant in the above-entitled action, is a corporation and has more than fifty stockholders in the said Hamilton county, Ohio; in which said county the said defendant keeps its principal office, and in which said county the said action is now pending; and that this affiant believes that the said Charles B. Snell cannot have a fair and impartial trial in the above-entitled action in the said county.

"(Signed) THOMAS L. MICHIE.

"Sworn to before me and subscribed in my presence this twenty-seventh day of November, 1896.

"[SEAL.] JOHN C. ROGERS,

"*Notary Public in and for Hamilton County, O.*"

40 cents due notary.

That the above was all the evidence introduced by either the plaintiff or the defendant in support of or against said motion.

That on the twenty-sixth day of December, 1896, the said motion came on for hearing upon the said affidavits hereinbefore set out, before the honorable common pleas court of Hamilton county, Ohio, and was argued by counsel and submitted to the court; and thereupon the honorable court of common pleas of Hamilton county, Ohio, overruled and denied the said motion; to which action and ruling of the court, in denying and overruling the said motion, the said Charles B. Snell, the plaintiff in the above-entitled action,

then and there excepted, and now comes and tenders this,
18 his bill of exceptions, and prays that the same may be allowed, signed, sealed and made a part of the record in the above-entitled cause, which is hereby accordingly done.

Witness the hand and seal of the court this twenty-eighth day of January, 1897.

M. F. WILSON,
Judge Court of Common Pleas.

19 Supreme Court of Ohio.

CLERK'S OFFICE, COLUMBUS, *July 12th*, 1899.

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the foregoing is a true copy of the printed record filed in this court in cause No. 6269—Charles B. Snell *vs.* The Cincinnati Street Railway Co.—and used by said court in consideration of said cause.

Witness my hand and the seal of said court this 12th day of July, A. D. 1899.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk*,
By JOHN P. DANA, *Deputy*.

20 THE STATE OF OHIO, } ss.
City of Columbus, }

In the Supreme Court of Ohio, January Term, A. D. 1899.

Certified Transcript of Docket and Journal Entries.

In the record and proceedings then and there had and held, among other things, is the following, to wit:

CHARLES B. SNELL, Plaintiff in Error, *vs.* THE CINCINNATI STREET RAILWAY COMPANY, a Corporation, Defendant in Error.	# 6269. Error to the Circuit Court of Hamilton County.

Sept. 21, 1898.—Petition in error and precipe filed.
" " " —Circuit court transcript filed.
" " " —Original papers and bill of exceptions filed.
" " " —Summons issued for defendant in error, directed to the sheriff of Hamilton Co.; returnable Oct. 3rd, A. D. 1898.
" 23, " —Part of papers taken by New Franklin Printing Co.

" 24, " —Summons returned and filed, endorsed: "1898, September 22nd.—Served the within-named The Cincinnati Street Railway Company, defendant in error, by delivering a true copy of this writ, with all the endorsements thereon, personally to James A. Collins, secretary thereof, no other chief officer being found." "Chris. Reichel, sheriff of Ham. Co., O., by Rob't Sweeny, deputy." "Fees, $1.24."

Oct. 4, " —Papers returned.

" " " —Printed record filed.

" 5, " —Printer's receipted bill filed.

" 6, " —Proof of service of printed record filed.

" 20, " —Plaintiff's printed brief & proof of service filed.

Nov. 5, " —Motion by plaintiff to advance, notice, & affidavit filed.

" 10, " —Typewritten brief of defendant on motion filed.

" 22, " —Journal entry: "Ordered by the court that said motion be, and the same is hereby, overruled. Case will take its place on the docket by its former number, 4464. Defendant's brief to be filed in 60 days. Request for oral argument noted." O. B. No. 16, pg. 220.

Feb'y 9, 1899.—Defendant's printed brief and proof of service filed.

May 9, " —Journal entry: "This cause came on to be heard upon the transcript of the record of the circuit court of Hamilton county and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judg-
21 ment of the said circuit court be, and the same hereby is, reversed, with costs; and, proceeding to render the judgment which the court should have rendered, it is considered and adjudged that the judgment of the court of common pleas be, and the same is hereby, reversed, with costs, for error in overruling the motion of the plaintiff for a change of venue.

It is further considered and adjudged that the plaintiff in error recover of the defendant in error his costs in this court and in the circuit court expended, to be taxed, and that the cause be remanded to the court of common pleas, with directions to grant the change of venue and for further proceedings according to law.

Ordered that a special mandate be sent to the court of common pleas of Hamilton county to carry this judgment into execution.

Ordered that a copy of this entry be certified to the clerk of the circuit court of Hamilton county 'for entry.'" O. B. No. 16, pg. 392.

May 16, 1899.—Mandate issued.
" " " —Original papers sent to clerk.
June 8, " —Journal entry: "On motion of said defendant in error, The Cincinnati Street Railway Company, this court order it to be certified and made part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein that in the rendition of said judgment of reversal it became and was material to the case to determine whether the certain act of the General Assembly of the State of Ohio known as and numbered section 5033 of the Revised Statutes of said State of Ohio was of binding force and validity against the said Cincinnati Street Railway Company, a corporation created by and existing under the laws of said State.

And the court order it to be further certified that said defendant in error claimed and asked this court to hold that said act, to wit, section 5033 of said Revised Statutes, is repugnant to the first section of the XIV amendment of the Constitution of the United States.

And the court order it to be further certified that the decision of the court was and is in favor of the validity of said statute.

It is hereby further certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had." O. B. No. 16, pg. —.

June 8, 1899.—Supersedeas bond filed.
July 18, " —Copy of writ of error filed.

22 STATE OF OHIO, *City of Columbus,* } ss:

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing transcript of docket and journal entries in the case of Charles B. Snell against The Cincinnati Street Railway Company, No. 6269, is truly taken and correctly copied from the records of said court, to wit, from Minute Book No. 19, page 559, and Order Book No. 16, pages 220 and 392.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this 8th day of June, A. D. 1899.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

23 [Endorsed:] In the supreme court of the State of Ohio. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. Certified transcript.

24 In the Supreme Court of the United States, October Term, 1898.

THE CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES B. SNELL, Defendant in Error.
} In Error to the Supreme Court of the State of Ohio.

Know all men by these presents that we, The Cincinnati Street Railway Company, as principal, and John Kilgour and William R. Avery, as sureties, are held and firmly bound unto Charles B. Snell in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Charles B. Snell, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, — the supreme court of the State of Ohio, in a suit depending in said court between Charles B. Snell, plaintiff in error, and The Cincinnati Street Railway Company, defendant in error, a judgment was rendered against said The Cincinnati Street Railway Company, and said The Cincinnati Street Railway Company having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and a citation directed to said Charles B. Snell, citing and admonishing him to be and appear at the session of the United States Supreme Court, to be holden at the city of Washington, within — days from the date thereof:

Now, the condition of the above obligations is such that if said The Cincinnati Street Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the Cincinnati Street Railway Co., Ohio, Org. July 1, 1880.]

CINCINNATI STREET R'Y CO.,
By JOHN KILGOUR, *President.*
JOHN KILGOUR. [SEAL.]
WM. R. AVERY. [SEAL.]

Sealed and delivered in presence of—
JOHN TAYLOR.
HOWARD R. PORTER.

Bond approved.

JOHN A. SHANCK,
Acting Chief Justice, Supreme Court of Ohio.

Approved June 29th, '99.
JOHN M. HARLAN,
Justice S. C. U. S.

25 STATE OF OHIO, *City of Columbus,* } *ss:*

Supreme Court of Ohio.

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the bond hereto attached is a true copy of the bond filed in this court in the case of The Cincinnati Street Railway Company *vs.* Charles B. Snell, in which writ of error has been allowed in the Supreme Court of the United States, and that said bond was approved by Honorable John M. Harlan, one of the justices of said court, June 29th, A. D. 1899.

Witness my hand and the seal of said supreme court of Ohio this 18th day of July, A. D. 1899.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By JOHN P. DANA, *Deputy.*

26 [Endorsed:] Duplicate. In the Supreme Court of the United States. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. In error to the supreme court of Ohio. Bond. Filed Jun- 8, 1899, in supreme court of Ohio. J. B. Allen, clerk.

27 In the Supreme Court of the United States.

THE CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error, *vs.* CHARLES B. SNELL, Defendant in Error. } In Error to the Supreme Court of the State of Ohio.

To the Hon. John M. Harlan, a justice of the Supreme Court of the United States:

Your petitioner, The Cincinnati Street Railway Company, a corporation organized under the laws of Ohio and doing business in the city of Cincinnati, in said State, to your honor respectfully represents and sets forth that at the October term, A. D. 1896, of the court of common pleas of the county of Hamilton, in said State, in a case wherein one Charles B. Snell was plaintiff and your petitioner, The Cincinnati Street Railway Company, was defendant, a judgment and order were rendered and made by said common pleas court in favor of your petitioner and against said Snell in the overruling of a certain motion and application made and filed by said Snell for a change of venue from said county wherein said cause was brought and was pending to another county of said State; that afterwards, on application of said Snell and without objection on his part, said cause was heard and decided finally upon its merits in said court of common pleas, and the verdict of the jury and the judgment thereon of said court were rendered in favor of your petitioner, the said judgment having been rendered on May 22, 1897; that afterwards said Snell caused a petition in error to be presented

to the circuit court for the first judicial district of *of* said State
28 in said county of Hamilton to reverse said final judgment solely on account of the error alleged to have been committed in overruling said application and motion for change of venue, but the same was at the January term, A. D. 1898, affirmed by said circuit court; that afterwards said Snell caused a petition in error to be presented to the supreme court of Ohio to reverse said judgment of affirmance, as well as the judgment and order of the said court of common pleas overruling said application and motion for change of venue, but on account only of the overruling of said application and motion, as aforesaid, and that the same were at the January term, A. D. 1899, to wit, on May 9th, reversed by said supreme court solely on the ground aforesaid, and a mandate was ordered to be issued commanding the said inferior courts to grant said motion and application for change of venue.

Your petitioner further represents and states that said application and motion were made under and in pursuance of section 5033 of the Revised Statutes of the State of Ohio, which is in words and figures as follows:

"SEC. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

It was specially set up and claimed by your petitioner that said statute was in conflict with the Constitution of the United States, and particularly with section 1 of article XIV in amendment thereof, and the said supreme court of Ohio (being the highest court of law or equity in said State in which a decision can be had in said cause) decided in favor of the validity of said statute,
29 and the judgment is in its practical operation and effect a denial to your petitioner of the equal protection of the laws of said State of Ohio, all of which appears plainly upon the face of the record of said cause, a certified transcript of which is presented herewith.

Thereupon your petitioner asks leave to have its writ of error in this behalf, to the end that it may be determined by the judgment of the Supreme Court of the United States whether said statute is not in conflict with the provisions of the Constitution of the United States; and it prays further for a supersedeas, and that the amount of the bond therefor may be fixed by your honor.

J. W. WARRINGTON,
E. W. KITTREDGE,
Att'ys for the Cincinnati Street Railway Company.

Writ allowed this June 29th, 1899.

JOHN M. HARLAN,
Asso. Justice Supreme Ct. U. S.

30 [Endorsed:] In the Supreme Court of the United States, October term, 1898. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. In error to the supreme court of Ohio. Petition for writ of error.

31 In the Supreme Court of the United States, October Term, 1898.

THE CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error, *vs.* CHARLES B. SNELL, Defendant in Error.	In Error to the Supreme Court of the State of Ohio.

Assignment of Errors.

On the — day of ——, 1899, of the same term, before the justices of the Supreme Court, at the Capitol, in the city of Washington, came the said The Cincinnati Street Railway Company, by Edmund W. Kittredge and John W. Warrington, its attorneys, and said that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the supreme court of the State of Ohio erred in holding that section 5033 of the Revised Statutes of Ohio, involved in said cause, is not in conflict with the Constitution of the United States, and particularly with article XIV in amendment thereof.

Second. That said court erred in reversing the judgments of the circuit court of the first judicial district of the State of Ohio and the common pleas court of Hamilton county, Ohio, when by the law of the land said judgments ought to have been affirmed.

Third. That said court erred in entering judgment in favor of said Charles B. Snell and against the said The Cincinnati Street Railway Company.

32 And said The Cincinnati Street Railway Company prays that the judgment of the supreme court aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by reason of the said judgment.

J. W. WARRINGTON,
E. W. KITTREDGE,
Attorneys for Plaintiff in Error.

33 [Endorsed:] In the Supreme Court of the United States, October term, 1898. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. In error to the supreme court of Ohio. Assignment of errors.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles B. Snell, plaintiff in error, and The Cincinnati Street Railway Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done
35 to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
—— ——.

36 [Endorsed:] The United States of America, *ss:* In the Supreme Court of the United States, October term, 1898. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. In error to the supreme court of Ohio. Writ of error.

37 In the Supreme Court of the United States, October Term, 1898.

THE CINCINNATI STREET RAILWAY COMPANY, Plaintiff in Error, *vs.* CHARLES B. SNELL, Defendant in Error.	In Error to the Supreme Court of the State of Ohio.

United States of America to Charles B. Snell, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Cincinnati Street Railway Company, a corporation under the laws of the State of Ohio, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Marshall Harlan, associate justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Marshal's civil docket, No. 1027.

38 On this 24th day of July, 1899, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared W. J. Sanderson before me, the subscriber, Robert C. Georgi, deputy clerk United States district court, southern district of Ohio, and makes oath that he delivered a true copy of the within citation to Charles B. Snell personally on the 22d day of July, A. D. 1899.

Seal United States District Court, Southern Dis. Ohio.

W. J. FAGIN,
Marshal, S. D. O.,
By W. J. SANDERSON, *Deputy.*

Sworn to and subscribed the 24th day of July, A. D. 1899.
[Seal United States District Court, Southern Dis. Ohio.]

ROB'T C. GEORGI,
Deputy Clerk U. S. District Court, S. D. O.

Marshal's Fees.

Fees:

4 mi., writ	.24
Service	2.00
	$2.24

Clerk's fees, $.45.

39 [Endorsed:] In the Supreme Court of the United States, October term, 1898. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell, defendant in error. In error to the supreme court of Ohio. Citation.

Endorsed on cover: File No., 17,478. Ohio supreme court. Term No., 364. The Cincinnati Street Railway Company, plaintiff in error, *vs.* Charles B. Snell. Filed July 28, 1899.

No. 110.

Office Supreme Court U.S.
FILED
NOV 12 1900
JAMES H. McKENNEY,
Clerk.

Br. of Warrington & Kittredge

The Robert Clarke Company, Printers.] [November, 1900.

Filed Nov. 12, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Cincinnati Street Railway Company,
Plaintiff in Error,

No. ~~304.~~ 110 *vs.*

Charles B. Snell,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE PLAINTIFF IN ERROR.

J. W. WARRINGTON,
E. W. KITTREDGE,
Attorneys for Plaintiff in Error.

The Robert Clarke Company, Printers.] [*November, 1900.*

Supreme Court of the United States.

OCTOBER TERM, 1899.

The Cincinnati Street Railway Company,
Plaintiff in Error,

No. 364.] *vs.*

Charles B. Snell,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This is a proceeding in error to the Supreme Court of the State of Ohio. The case was begun in the Common Pleas Court of Hamilton County of that State. It was an action in tort of Snell, defendant in error, against the Street Railway Company, plaintiff in error, to recover damages for personal injuries which were alleged to have been caused by negligence of the Street Railway Company. The cause was tried in that court with a jury at the request of Snell and a verdict was rendered in favor of the Street Railway Company upon the merits on April 30, 1897 (R. 5). Motion for new

trial was made and overruled and judgment was rendered for defendant on the verdict May 22, following. The case being thus set down and tried upon plaintiff's request no objection was made to the empanneling of the jury, no exception was taken during the progress of the trial nor to the charge of the court under which the verdict was rendered; and no proceeding in error or otherwise to reverse the judgment so entered upon the verdict was ever begun or prosecuted, except only as we shall now proceed to describe (R. 3).

On November 27, 1896, at a term long prior to the trial just mentioned, the plaintiff below, Snell, made a motion for change of venue, and at the same time filed his own affidavit and also the affidavits of five other persons (R. 5). On December 26, 1896, this motion was overruled and exception taken. On January 27, 1897, a bill of exceptions was allowed and filed, showing what occurred upon the motion so overruled (Id). This bill of exceptions will be found at pp. 6–9 of the record.

The proceeding for change of venue was taken under section 5033 of the Revised Statutes of Ohio, to-wit:

> "Sec. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he can not, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

It will be observed that the affidavits aforesaid, which alone the bill of exceptions comprises, state only that the Street Railway Company is a corporation having more than fifty stockholders in said Hamilton county, wherein the action is pending and its principal office is kept, and (in

Snell's affidavit) that he can not, "as he believes, have a fair and impartial trial in the said county:" and the five other affidavits only add that each affiant "believes that the said Charles B. Snell can not have a fair and impartial trial in the above entitled action in the said county" (R. 6-9).

After judgment on the merits as aforesaid in favor of the Street Railway Company, proceedings in error were begun and prosecuted in the state Circuit Court, sitting in Hamilton county, to reverse the judgment, because the motion for change of venue under the above section of the statutes of Ohio, 5033, was overruled. By leave of the Circuit Court, the Street Railway Company, defendant in error in that court, filed an amendment to its answer, wherein it alleged, among other things, that said Section 5033 was "in conflict with the Constitution of the United States, and more particularly with Section 1 of the Fourteenth Amendment thereof," and that the section is null and void for that reason (R. 4). On July 18, 1898, the judgment of the Common Pleas Court was affirmed by the Circuit Court (R. 4). On September 21, 1898, Snell began a proceeding in error in the Supreme Court of Ohio to reverse the judgment of the Circuit Court (R. 1-2). The only error assigned in that court upon which reliance was made was that the Circuit Court erred in affirming the judgment of the Court of Common Pleas, "which overruled and denied the motion of the plaintiffs in error to change the venue in the said action to the adjoining county from the said Hamilton county, most convenient to the parties to said action, pursuant to the provisions of Section 5033 of the Revised Statutes of Ohio (R. top p. 2).

On May 9, 1899, the Supreme Court of Ohio rendered final judgment in the cause, as follows:

> ". . . On consideration whereof it is ordered and adjudged by this court that the judgment of the said Circuit Court be and the same is hereby reversed, with costs: and, proceeding to render the judgment which

the court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be and the same is hereby reversed, with costs, for error in overruling the motion of plaintiff for a change of venue. . . .

"Ordered that a special mandate be sent to the Court of Common Pleas of Hamilton county to carry this judgment into execution" (R. 11).

On June 8, 1899, the Supreme Court of Ohio made an entry showing that the Street Railway Company raised the question in that court of invalidity of section 5033 of the Revised Statutes of Ohio, under the Fourteenth Amendment to the federal constitution, as follows:

"On motion of said defendant in error, The Cincinnati Street Railway Company, this court order it to be certified and made part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein that in the rendition of said judgment of reversal it became and was material to the case to determine whether the certain act of the General Assembly of the State of Ohio, known as and numbered section 5033 of the Revised Statutes of said State of Ohio, was of binding force and validity against the said Cincinnati Street Railway Company, a corporation created by and existing under the laws of said state.

"And the court order it to be further certified that said defendant in error claimed and asked this court to hold that said act, to-wit, section 5033 of said Revised Statutes, is repugnant to the first section of the fourteenth amendment of the Constitution of the United States.

"And the court order it to be further certified that the decision of the court was and is in favor of the validity of said statute.

"It is hereby further certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had." (R. 12.)

To reverse the judgment aforesaid of the Supreme Court of Ohio, the writ of error was allowed in this court June 29, 1899. (R. 14–16.) The decision below will be found in 60 Ohio St. 256.

ASSIGNMENT OF ERRORS.

The errors assigned at the time of the allowance of the writ of error will be found at page 16 of the record. So far as our argument is concerned, we rely upon the first one (R. 16):

> "That the Supreme Court of the State of Ohio erred in holding that section 5033 of the Revised Statutes of Ohio, involved in said cause, is not in conflict with the Constitution of the United States, and particularly with article fourteenth in amendment thereof."

PROPOSITIONS.

1. Section 5033 of the Revised Statutes of Ohio arbitrarily selects a certain portion of a type or class of persons (to-wit, corporations having fifty or more stockholders) and not only denies to them rights as actors in judicial proceedings which are accorded to the rest of the class, but also denies to them a substantial privilege which it grants to opposing litigants in the same cause; the statute therefore denies to such proscribed litigants the equal protection of the laws which is secured to all persons by section 1 of amendment fourteenth to the Federal Constitution.

2. The judgment sought to be reversed is a final judgment within the meaning of the act of Congress defining the appellate jurisdiction of this court.

ARGUMENT.

I.

In view of the exhaustive discussions and the decisions of this court, in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, and *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, we do not think it necessary to burden the court with elaborate argument or citation of authorities to show that it is beyond the legislative power, either federal or state, to accord rights or privileges to one class of litigants which are denied to others under like or similar circumstances; or, in short, to deny them the right to stand equal before the law. This is especially true in a case, like this, which involves no statutory police regulations, but only the respective rights of parties in the administration of justice in civil actions.

An inspection of the statute in question, O. R. S., sec. 5033, p. 2, *supra*, will show that its purpose is, in an action to which a corporation having more than fifty stockholders is a party, to give to the opposite party, whether plaintiff or defendant, the right himself, when supported by five resident affiants, to change the venue of the cause. We say *himself* because, according to the interpretation of the Supreme Court of Ohio when such affidavits are filed, the court has no discretion, but is bound to order the change of venue. The statute, according to the court, does not require that the affidavits should state facts from which the court may itself deduce the conclusion as to whether a "fair and impartial trial" can or cannot be had in the county; but it only requires that each affiant shall state that "he believes" that such a trial cannot be had there. Such was the construction given to the act in this very case (*Snell* v. *Street Railway Co.*,

60 Ohio St., at 270). Thus, the right to change of venue so given to the party opposed to the corporation having fifty or more stockholders, is both substantial and arbitrary in its character; it leaves nothing for the court to do but to submit to the order demanded.

Now, our complaint is not that it is beyond the power of legislation to vest arbitrary right or power of this kind in a litigant; but it is that the right must be extended equally to all litigants in the case. It is true perhaps that the inducement to enact this statute was a belief that corporations having fifty or more stockholders might have an undue influence in the county in which their principal offices were kept. But this overlooks the common experience of everyone, that such corporations might be subject to undue local prejudice. It ignores the fact, too, that all or substantially all the stockholders might be non-residents of the county in which the principal office is kept; and what influence would non-resident stockholders have? It ignores the fact that *individuals* doing business in a particular locality may each have more than fifty employès.

The act seems to proceed upon the theory that numbers shall be the basis upon which the class shall be erected; but its conception of numbers appears only to indicate influence, and only to do so if the numbers comprise corporate stockholders. Plainly, mere numbers are not a natural and constant token of popular influence at all. Numbers may arouse prejudice as well as favor; indeed, we know they do. Nor can the attribute of either favor or prejudice be restricted to numbers of corporate stockholders; such attributes belong as well and naturally to groups of individuals who have no corporate connection whatever. A more natural and constant basis of favor or prejudice would be the character of business conducted than the number of persons engaged in it. It is easy to observe the differences in effect between kinds of business which on the one hand af-

fect large numbers of patrons or residents, such as gas, electric light, street railway and fertilizer companies, and kinds of business which on the other hand affect or arouse the attention of small numbers of citizens, such as ordinary manufacturing or commercial establishments.

The impediment to a fair and impartial trial by a jury, so far as the place of trial is concerned, is necessarily the existence of favor or prejudice for or against one of the parties to an action. The existence of such favor or prejudice cannot be predicated upon the mere fact of the number of those who are either directly or indirectly interested in the litigation; and consequently if the right to a change of venue is to be made to rest upon the belief of five or more affiants that such favor or prejudice for or against either party exists to prevent a fair trial, the law necessarily must accord to either party equally the right to a change of venue upon the existence of such belief.

The question, then, is, whether it is open to legislation to assume that the presence of mere numbers on one side or the other of a lawsuit may arouse for them such favor as to entitle the opposite party alone, and not either party, upon the sworn belief of five persons or otherwise, to a change of venue. Since prejudice as well as favor may be engendered by numbers, since character of business may be even more effective than numbers in producing either of these results, there is no sound basis for the discrimination which the present statute imposes. It might as well be said that the race to which one or the other of the litigants belongs, or his religious or political belief, or his wealth or poverty, or even sex or other physical attributes, should be the token for according or denying to the opposite party alone the privilege, upon the affidavits of belief mentioned in this statute, to have a change of venue. If the belief of five affiants in the existence of favor or prejudice is made the ground of an absolute right to change of venue, the ex-

istence of that belief, however occasioned, must entitle not merely one of the litigants, but must equally entitle every litigant to the right.

We desire in this connection to call attention to section 5032 of the Revised Statutes of Ohio. That statute provides in substance that if upon complaint made by any party to a law-suit, it is made to appear to the satisfaction of *the court*, that a fair and impartial trial cannot be had, the court may order a change of venue. But the section in question leaves nothing to the court in this class of cases except to ascertain whether or not one of the litigants making the application, and five persons swear that they believe that a fair and impartial trial cannot be had. It then becomes the imperative duty of the court to order the change of venue. The point of difference which we wish to make clear at this stage is not alone the difference in function which the two statutes vest in the courts, but also and particularly that under section 5032 any and all of the parties to the litigation are given the right to a change of venue, while under section 5033 "the opposite party" alone is given that right. In the latter case, in the language of this court in *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis*, *supra*, litigants "do not enter the courts upon equal terms. In the suit in which they are parties they are discriminated against and not treated as others. They do not stand equal before the law. They do not receive its equal protection." (Id., at p. 153.)

The principles laid down in the decision of the case last cited are totally ignored by the decision of the Supreme Court of Ohio in this case. In the first place that court, as it seems to us, erroneously conceives that the legislation now in dispute does not differ in principle from those Ohio statutes which require actions brought against individuals to be brought in the county where they reside, or generally against corporations in the county in which they are situated or have their principal offices or agents; whereas, actions

may be brought against insurance companies in the county where the cause of action arises, against a mining corporation in the county in which it owns or operates its mines, and against railroad companies in any county in which the roads run. (60 Ohio St., at 267, 268.) Our criticism upon this is, that these are not analogous statutes. In order to make them correspond with the one in dispute, they would have to separate individuals and also separate corporations of the same kind, and allow suits to be brought against part of them in one place, and against the rest in another and different place, although all the individuals or all the corporations would be identical both as to circumstances and location. Would that court, or would any court say that the individuals and corporations residing in the eastern counties of the state could be sued differently as to locality and the like, from individuals and corporations residing in the western counties of the state?

Another alleged analogy employed by that court deserves a word of comment. It says, at page 269, that the principle of this statute is like that of the act of Congress relating to the removal of causes in cases of diverse citizenship, in that the citizen of the state in which the suit is brought is not permitted, while the citizen of the other state is permitted, to have the cause removed to a federal court. We need not stay to discuss the power of Congress in this behalf under Section 2, of Article III, of the Federal Constitution. But suppose an act of Congress were to provide that the citizen of the other state could have removal only in the event of the resident citizen belonging to a particular race, or having a particular religious or political belief, or being a corporation and having a specified corporate object or number of stockholders, or the like, would any one claim that the act would stand for a moment? The validity of the Removal Act lies in the equal rights it affords to all non-

residents as against all residents of the state in which the action is brought.

The court below attempted to distinguish the present case from *Coal Co.* v. *Rosser*, 53 Ohio St. 12, and just why it did not at the same time attempt to distinguish the present case from *Gulf, Colorado & Santa Fè Ry. Co.* v. *Ellis, supra*, we do not know. We do know that both cases were cited to the court. The effort to distinguish *Coal Co.* v. *Rosser* seems to have gone upon the theory that the statute there involved imposed a penalty in the way of an attorney's fee upon one party to the suit, which as to the other party under like conditions it did not do. Can it be that the imposition upon one party of a charge as counsel fee differs in principle from the case of the denial of a substantial right to one party which is given to the other? That, as it seems to us, would be to reduce the equality of right guaranteed by the Constitution to the mere question of a money charge. But even if this were so, the extra expenditure of money imposed by the change of venue through the exercise of the right given to one and not to the other litigant, would furnish the requisite condition.

II.

The judgment in question is final within the meaning of the act of Congres defining the appellate jurisdiction of this court.

We may say in passing that we have already shown in the preliminary statement of this brief, that the Street Railway Company obtained a judgment upon the merits of this cause without objection or exception on the part of the plaintiff in error, except only as to the overruling of the motion for a change of venue. The Street Railway Company is entitled to that judgment, and ought not to be deprived of the ben-

efit of it or subjected to another trial of the questions involved under it, unless Snell was in truth validly entitled to the change of venue in question. If section 5033 is invalid under the Fourteenth Amendment, then there can be no warrant for depriving the Street Railway Company of the benefit of the verdict of the jury and the judgment upon it of the court below. If the judgment of the state Supreme Court of which we complain is reversed upon the grounds which we have submitted, it determines the litigation.

But it is not merely of the judgment upon the verdict that we wish to speak. We go further. We repeat that the judgment of the Supreme Court of Ohio, which we are now seeking to reverse, is of itself a final judgment within the appellate jurisdiction of this court. That judgment related to and involved only the question of the right of Snell to the change of venue. Nothing else was brought upon the record to the Supreme Court of the state, and nothing else was or could be decided by that court. Even an affirmance of that judgment could affect nothing else.

The question presented upon the error assigned in the Supreme Court of the state was a question that involved the final determination of the right of the parties, for if the cause was tried below in the proper tribunal there was no controversy in the Supreme Court, but that the proper judgment had been rendered. It is not always true that a reversal of the judgment of an inferior tribunal by the Supreme Court of a state and remanding of the cause to the inferior tribunal, is not reviewable in this court. The judgment of the Supreme Court of Ohio was final as to the right of the Street Railway Company to have the cause against it tried within the jurisdiction of its corporate residence, and so to avoid the expense and inconvenience and burden of a trial in another and different jurisdiction. We submit that it has the right to have this court review this decision of the Supreme Court of Ohio as a final judgment upon the question whether

the railway company can be deprived of this right by a statute that is in conflict with the Federal Constitution.

Weston et al. v. *The City Council of Charleston*, 2 Pet. 449.

O'Dowd v. *Russell*, 14 Wall. 402.

We therefore ask a reversal of the judgment of the Supreme Court of Ohio.

Respectfully submitted,

J. W. WARRINGTON,

E. W. KITTREDGE,

Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 110.

THE CINCINNATI STREET RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES B. SNELL, DEFENDANT IN ERROR.

Additional Brief for Plaintiff in Error on Question of Jurisdiction.

In determining whether the judgment is final or not, within the meaning and scope of the court's appellate jurisdiction, we should not lose sight of the fact that the only question presented by the proceedings in error in Ohio and decided thereunder by the courts of that State was whether the Street Railway Company had a right to have the suit pending against it tried in the county of its residence. That question was decided in its favor by the court of first instance. That right was affirmed by the court of second instance. That

right was denied it by the court of last resort. That question can never be tried again in Ohio. It is settled forever against the Street Railway Company, so far as the courts of that State are concerned. A judgment of this court in this proceeding would settle the question forever, no matter whether the judgment were one of affirmance or of reversal. If it were one of affirmance, the Street Railway Company was not entitled to and could not have its case tried in the county of its residence. If it were one of reversal, then the Street Railway Company was entitled to have its cause tried there, and no error occurred in trying it there. It follows that, the question being once determined here, it can never be brought back to this court, no matter how it may be determined here, and no matter how the case might be determined later in the Ohio court, if the result were to require it to be tried over again. There is no Federal question in the cause, except as to the validity or invalidity of the statute giving the right of change of venue, and consequently one determination here of that question would settle it forever.

The judgment of the supreme court of Ohio was not simply a judgment of reversal and remanding the case for further proceedings according to law, but it was a special judgment "that the cause be remanded to the court of common pleas, *with direction to grant the change of venue*" (R., 11). This part of the judgment places this subject beyond the control of the inferior tribunal and disposes effectually of so much of the controversy as determines the right of the plaintiff in error to the protection of the provision of the Federal Constitution which we invoke. In the language of Mr. Justice Gray, in

Telegraph Co. *vs.* Burnham, 162 U. S., at page 342, the inferior court "was directed to enter a judgment rendered by the Supreme Court and carry it into execution." It is therefore a final judgment of the Supreme Court as to the Federal question involved in the case.

The provision of the judgment is an inseparable part of the judgment of the supreme court as an entirety. If it is affirmed by this court it will finally dispose of the case, so far as this court is concerned. If it is reversed and the case remanded to the supreme court of Ohio for further proceedings they will necessarily be such only as are consistent with the determination of the Federal question by this court; and as no other error was complained of or found in the record by the supreme court of Ohio than that involving the validity of section 5033 of the Revised Statutes of Ohio, the judgment on the verdict in favor of the plaintiff in error will be preserved to it. In no other way can the substantial right of the plaintiff in error be conserved.

The question is, perhaps, analogous to that presented in the circuit court of appeals for the first circuit, in the case of *Potter vs. Deal*, reported in 50 Federal Reporter, 860. In that case the circuit court had made an order that its master should take possession and make private examination of the books and papers of the plaintiff, and to deliver certain of them to the plaintiff and certain of them to the defendant. The appellate court found that this order clearly violated the constitutional and fundamental rights of the litigant, and the court held that in so far as this order denied to the litigant the protection of the Constitution, it was final, and necessarily so to be regarded, from which an appeal

might be taken before any other decree disposing of the issues generally in the case.

One purpose, if not the primary purpose, of limiting the appellate jurisdiction of this court to re-examine, reverse, or affirm "a *final* judgment or decree" of the highest court of a State (U. S. Rev. Stat., sec. 709) was to relieve this court of the necessity and burden of hearing and determining repeated appeals or proceedings in error in the same cause. It is entirely consistent with this purpose to treat the present judgment as final, within the meaning of this court's appellate jurisdiction; for, as already shown, the cause can never be brought back to this court for retrial upon the only question which the supreme court of Ohio has decided and the only question which is presented here for decision, to wit, the validity or invalidity of Ohio Revised Statutes, section 5033, under the fourteenth amendment. In other language, the litigation between the parties on that subject will be ended by the judgment rendered here, no matter whether it be a judgment of affirmance or a judgment of reversal. This seems to us to be all that is required to establish finality, within the true meaning and intendment of the numerous decisions of this court. We think it a fair observation to be made of the decisions that this court has given liberal construction to the act defining its appellate jurisdiction in this regard wherever it would subserve the purpose of the act by settling the controversies so far as they involved Federal questions (McGourkey *vs.* Toledo & Ohio R. R., 146 U. S., 536, at 546 *et seq.*).

Another test, and we submit the controlling test of finality, is by inquiring whether there is any method of conserving

the Street Railway Company's present obvious right to the judgment rendered in the common pleas court upon the verdict in its favor, except by determining here and now the validity or invalidity of section 5033 under the fourteenth amendment. We feel safe in saying that the benefit of that judgment would be lost to the Street Railway Company if this court were now to decline jurisdiction. The judgment of the supreme court of Ohio was rendered at its January term, 1899 (60 O. S., 256). That judgment reversed the judgment upon the verdict in the court below (*ibid.*, at 273). Now, if we were sent back to the court of first instance to try the case under the order "to grant the change of venue," and then after suffering judgment and bringing the case through the courts of Ohio to this court again for a decision as to the validity of section 5033, we know of no way by which the judgment of reversal rendered, as aforesaid, by the supreme court of Ohio at its January term, 1899, could be changed so as to restore to us the judgment upon the verdict which it destroyed. The term of the supreme court at which this was done has already passed into history. There is no statute in Ohio which furnishes a mode for opening up a judgment rendered under such circumstances after so long a lapse of time—indeed, after the expiration of the term. Even the rule of the court would be against us upon an application for a rehearing. Rule XX of that court provides:

"Such application (for a rehearing) must be made at the term at which the decision is rendered and within thirty days of the announcement of the decision."

We could not ask to have the judgment restored by an entry *nunc pro tunc;* for there was nothing done or omitted

to be done during that term in respect of that judgment otherwise than as expressly intended (The Bayonne, 159 U.S., 687, at 692, 693). It therefore is inevitable that the only way in which the Street Railway Company can be protected in its rights under the verdict and judgment thereon in question is to determine now whether those rights are being sought to be destroyed by an unconstitutional statute under the fourteenth amendment. Mr. Justice Blatchford, in Keystone Iron Co. *vs.* Martin, 132 U. S., 91, at 94, quoted with approval language of Mr. Chief Justice Taney, which clearly implies that injury to a plaintiff in error by refusing jurisdiction is a subject for consideration. The language is:

"The appellant is not injured by denying him an appeal in this stage of the proceedings," etc.

Respectfully submitted.

E. W. KITTREDGE,
J. W. WARRINGTON,
Counsel for Plaintiff in Error.

NOVEMBER 17, 1900.

Supreme Court U.S.
FILED
NOV 14 1900
JAMES H. McKENNEY,
Clerk

No. 110.

Brief of Michie for D. C.

No. ~~304~~ 110

Filed Nov. 14, 1900.

Supreme Court of the United States

OCTOBER TERM, 1900.

THE CINCINNATI STREET RAILWAY COMPANY,

Plaintiff in Error,

versus

CHARLES B. SNELL,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief for Defendant in Error.

JOHN W. WOLFE,
THOS. L. MICHIE,
For Defendant in Error.

The Court Index Press, Cincinnati, Ohio.

Supreme Court of the United States

OCTOBER TERM, 1900.

THE CINCINNATI STREET RAILWAY COMPANY,
Plaintiff in Error,

No. 364. *vs.*

CHARLES B. SNELL,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

Brief for Defendant in Error.

We have not been furnished with a copy of the brief of the plaintiff in error and will confine our efforts to showing that the decision of the Supreme Court of Ohio in this case is not in conflict with the Constitution of the United States and particularly with Article 14 in amendment thereof, which is the assignment of error made by the plaintiff in error.

We cite a few authorities showing that Section 5033 of the Revised Statutes of Ohio is not unconstitutional, in that it does not impose a *penalty*, neither is it *class legislation*, but merely furnishes a rule applicable to all parties similarly situated, and coming within the terms of its provision, by

which to guaranty to every one a fair trial free from all local influences.

There is no presumption that one court created by the laws of the state of Ohio will not give just as fair a trial as any other court in the same state. This court has always leaned to the construction of state statutes by the courts of last resort of the state. "But in determining whether the Legislature in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well settled rule of constitutional exposition that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

Sweet v. *Rechel*, 159 U. S., 380–392.
Pressler v. *Illinois*, 116 U. S., 252, 269.

The 14th Amendment does not enlarge the privileges or immunities of a citizen of the United States, but furnishes a guaranty for existing privileges and immunities and prohibits the state from abridging them.

Bradwell v. *The State*, 16 Wall, 130.
In re Lockwood, Petitioner, 154 U. S., 116.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversity in these respects may exist in two states separated by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.

Missouri v. *Lewis*, 101 U. S., 22, 31.

There is no constitutional objection to legislation that is special in its character. A statute abolishing the defense

of co-servant in railway injuries, does not deny to railroads the equal protection of the laws.

Missouri Ry. Co v. *Mackey*, 127 U. S., 205, 209.

To same effect see

Missouri Pac. Ry. Co. v. *Humes*, 115 U. S., 512.
Minn. R. Co. v. *Beckwith*, 129 U. S., 26.
Minn. & St. L. Ry. v. *Emmons*, 149 U. S., 364.
St. Louis & San. Fran. Ry. Co. v. *Mathews*, 165 U. S., 1.
Hayes v. *Missouri*, 120 U. S., 68.
Bell's Gap Ry. Co. v. *Pennsylvania*, 134 U. S., 237.
Atchinson, Topeka & Santa Fe R. R. Co. v. *Mathews*, 174 U. S., 96.

In this last case from a careful perusal of the minority opinion of the court, the law seems to be concededly settled in favor of the validity of Section 5033, Revised Statutes of Ohio. See, also,

Waters-Pierce Oil Company v. *Texas*, 177 U. S., 28.

In *Snell* v. *the Cincinnati Street Railway Company*, 60 Ohio State, 256, the Supreme Court of Ohio held that Section 5033 of the Revised Statutes of Ohio is not in conflict with the State or Federal Constitution. The very able opinion of our Supreme Court in this case by Williams, J., is found commencing on page 266, 60 Ohio State, and is a more learned and stronger argument than we feel able to attempt. Our court has ably discussed the very question raised in this court, and we are well content to rest our cause upon this solid foundation.

Respectfully submitted,

JOHN W. WOLFE,
THOS. L. MICHIE,
For Defendant in Error.

Supreme Court of the United States.

No. 110.—October Term, 1900.

The Cincinnati Street Railway Company, Plaintiff in Error, *vs.* Charles B. Snell.	In error to the Supreme Court of the State of Ohio.

[December 17, 1900.]

This was an action of tort instituted by Snell in the Court of Common Pleas of Hamilton County, Ohio, against the Street Railway Company, to recover damages for personal injuries alleged to have been caused by its negligence.

On November 27, 1896, plaintiff Snell made a motion for a change of venue, and in support thereof filed his own affidavit as well as the affidavits of five other persons, in compliance with the following section of the Revised Statutes of Ohio:

"Sec. 5033. When a corporation having more than fifty stockholders is a party in an action pending in a county in which the corporation keeps its principal office, or transacts its principal business, if the opposite party make affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the several affidavits of five credible persons residing in such county, the court shall change the venue to the adjoining county most convenient for both parties."

This motion was overruled and an exception taken on January 28, 1897. A bill of exceptions was allowed and filed, showing what had occurred upon the motion so overruled.

The case came on for trial before a jury, and resulted in a verdict in favor of the Railway Company. Motion for a new trial was made and overruled, and judgment entered for the defendant upon the verdict.

After this judgment upon the merits, proceedings in error were begun and prosecuted in the State Circuit Court, sitting in Hamilton County, to reverse the judgment by reason of the refusal of the Court of Common Pleas to change the venue under the section of the statute above quoted. By leave of the Circuit Court, the Railway Company filed an amendment to its answer, wherein it alleged, among other things, that section 5033 was in conflict with the Fourteenth Amendment to the Constitution of the United States. The judgment of the Court of Common Pleas was affirmed by the Circuit Court, July 18, 1898, whereupon Snell began a proceeding in the Supreme Court of the State to reverse the judgment of the Circuit Court, the only error assigned being to the judgment

of the Circuit Court affirming the judgment of the Court of Common Pleas denying a change of venue.

On May 9, 1899, the Supreme Court of Ohio rendered the following judgment: "On consideration whereof it is ordered and adjudged by this court that the judgment of the State Circuit Court be, and the same is hereby, reversed with costs; and proceeding to render the judgment which the court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be, and the same is hereby, reversed, with costs, for error in overruling the motion of the plaintiff for a change of venue. It is further considered and adjudged that the plaintiff in error recover of defendant in error his costs in this court and in the Circuit Court expended, to be taxed, and that the case be remanded to the Court of Common Pleas, with directions to grant the change of venue, and for further proceedings according to law." (60 Ohio St. 256.)

Mr. Justice BROWN delivered the opinion of the Court.

This writ of error must be dismissed for lack of finality in the order appealed from. We have held in too many cases even to justify citation, that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court. It is true that the order appealed from finally adjudges that a change of venue should have been allowed; but the same comment may be made upon dozens of interlocutory orders made in the progress of a cause. Indeed, scarcely an order is imaginable which does not finally dispose of some particular point arising in the case; but that does not justify a review of such order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to a cause, it might in some cases require a dozen writs of error to dispose finally of the case. Moreover, the action of the railway company in prosecuting this writ of error is somewhat inconsistent with its position in the Circuit Court, where in its answer it prayed that "since the order overruling the motion for a change of venue was interlocutory and not final, and since no other proceedings in error have been commenced herein, the present petition in error may be dismissed."

It is true that after the change of venue was denied, the case was tried upon the merits, and a verdict and judgment rendered for the defendant, of the benefit of which it was subsequently deprived; but it loses no right by acquiescing for the time being in the action of the State court, since, after judgment ultimately rendered, it may have a writ of error reaching back to the alleged error of the State court, if it involve a Federal question. The case is not unlike that of the refusal of a State court to permit the removal of a cause to the Circuit Court of the United States, or the

action of the latter in remanding or refusing to remand. Such removal, although affirmed by the Supreme Court of the State, does not authorize a writ of error from this court until after final judgment, when, if the removal be found to have been erroneous, the subsequent proceedings in the State court go for naught. (*Railroad Co.* v. *Wiswall*, 23 Wall. 507; *Moore* v. *Robbins*, 18 Wall, 588; *Illinois Central R. R. Co.* v. *Brown*, 156 U. S. 386.) Whether in this case defendant's judgment will be reinstated, as it was originally entered, is a question which does not properly arise at this stage of the proceedings. It is sufficient to say that the order appealed from lacks every element of finality, and the writ of error is therefore

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.